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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 1287

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ASHLAND COAL AND ICE COMPANY, INC., ET AL.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

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## STATEMENT AS TO JURISDICTION AND MOTION TO AFFIRM

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# SUPREME COURT OF THE UNITED STATES

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# No. 1287

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ASHLAND COAL AND ICE COMPANY, INC., ET AL.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

---

## STATEMENT OF APPELLEE RAILROADS AS TO JURISDICTION AND MOTION TO AFFIRM

Filed April 21st, 1945

Appellee railroads [1], interveners as parties defendant below, pursuant to Rule 12, Paragraph 3 of the Rules of the Supreme Court of the United States, respectfully move that the decree of the specially constituted District Court of three judges [2], dated February 14, 1945, from which this direct appeal is taken, be affirmed. The said decree dis-

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[1] Atlantic Coast Line Railroad Company, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Richmond, Fredericksburg and Potomac Railroad Company, Seaboard Air Line Railway (L. R. Powell, Jr., and Henry W. Anderson, Receivers), Southern Railway Company, and The Virginian Railway Company.

[2] The District Court was convened pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. Sec. 47).

missed appellants' (plaintiffs below) complaint to set aside in part a report (256 I. C. C. 429) and order of the Interstate Commerce Commission entered November 8, 1943, in its complaint dockets Nos. 27648, et al., styled *Ashland Coal & Ice Company, Inc., et al.*, v. *Atlantic Coast Line Railroad Company, et al.* The decree was based upon the District Court's findings that the case was not within its jurisdiction and that, even if jurisdiction was assumed, the complaint should be dismissed on the merits.

As grounds for this motion these appellees rely upon the grounds set forth in the motion to affirm filed herein by the United States and the Interstate Commerce Commission, appellees, on April 12, 1945, and upon such supplemental and further grounds as they hereinafter respectfully show unto this Court.

Appellants, receivers of bituminous coal at Richmond and certain other points in the State of Virginia north, south and west of Richmond, were among parties complaining before the Commission that certain freight rates published and applied by these appellees for the transportation of bituminous coal, in carloads, via interstate routes from mines in West Virginia, Kentucky and Virginia to points in a large area in eastern Virginia (Richmond was the approximate geographic center of the area), grouped for rate-making purposes into a single destination freight rate group[3] known as the "$2.65 group," had been, were and for the future would be unreasonable in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1).[4]

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[3] From any point of origin, the same rate applied to all points in the destination group.

[4] The rates to points in a second destination group, known as the Lynchburg group, also were at issue upon separate complaint (Docket No. 27739) consolidated for hearing and decision with the complaints attacking the rates to the $2.65 group. Insofar as they pertain to rates to the Lynchburg group, the Commission's report and order are not here assailed.

The complaining parties sought reparation on past shipments and reduced rates for future application. In the report under attack, the Commission found as to the past that none of the assailed rates had been unreasonable and, accordingly, that reparation should be denied, and for the future that the existing destination group was too large and should be divided, that to points in the eastern division, known as the new "Norfolk group," the assailed rates were not unreasonable, but that to points in the western division, known as the new "Richmond group" and including all of the points at which appellants are located, the assailed rate of $2.65 per net ton [5] from points in the base origin groups [6] would be unreasonable to the extent that it exceeded a rate of $2.45 per net ton. The order under attack simply gave effect to the latter finding. Only the $2.65 base rate is involved in this suit.

Appellants brought this suit to set aside the report and order insofar as the Commission failed to hold that the rates found unreasonable for the future were not equally unreasonable in the past. They alleged (a) that the Commission acted arbitrarily in drawing from the "same

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[5] Pursuant to authority granted by the Commission in *General Commodity Rate Increases, 1937,* 223 I. C. C. 657, the rate was increased 10 cents effective November 15, 1937. A further increase of 5 cents was made effective March 18, 1942, under the authority granted by the Commission in *Increased Railway Rates, Fares and Charges, 1942,* 248 I. C. C. 545. The latter increase was removed effective May 15, 1943, pursuant to a further report and order in that proceeding, 255 I. C. C. 357. These were general revenue cases and related to the entire railroad rate structure throughout the country. Coal rates to Virginia were not treated separately.

Throughout its report here assailed, the Commission referred to the rates excluding the general increases. The Commission's practice will be followed in this motion.

[6] The points of origin also were grouped for rate-making purposes. From all points in several origin groups known as the base groups to all points in the destination group a rate of $2.65 applied. Higher rates applied from the other origins embraced in several so-called differential origin groups.

mass of evidence" different conclusions respecting the measures of reasonable rates in the past and of reasonable rates for the future, although in the proceedings before the Commission these same parties had contended, *inter alia*, that the evidence would support findings that the destination group should be divided, but only for the future, and that a maximum reasonable rate for future application to points in the western division should be at least 19 cents per net ton lower than the rate found as maximum reasonable in the past, and (b) that in denying reparation the Commission erred as a matter of law by substituting a supposed rule of damage for its function of ratemaking. None of the evidence before the Commission, comprising some 1300 typewritten pages of testimony and some 254 exhibits,[7] was submitted to the court below. Appellants relied largely upon the face of the Commission's report to support their allegations of arbitrary action and misconstruction of the authority conferred upon the commission by the statute. Defendants questioned the jurisdiction of the court to consider the issues presented, denied appellants' allegations, showed that the Commission had been faced with two distinct questions, reasonable rates in the past to the $2.65 destination group as a unit and reasonable rates for the future to the new divisions of the old group, and pointed out that the report contained a separate administrative determination of each question, supported by essential basic findings, and an adequate rational basis for the assailed conclusion of past reasonableness, requiring a denial of reparation.

The District Court considered all of the issues and found against appellants on each. The opinion of the court reflects careful consideration of the evidence before it and the contentions of the parties. Its conclusions were ra-

[7] See paragraph VIII of Commission's answer.

tional. These appellees believe that there is such lack of substance in the questions here raised by appellants as not to require oral argument before this Court.

**(a) Jurisdiction**

The ultimate objective of this suit is the recovery of reparation. Appellants elected to pursue their remedy before the Commission. Reparation there having been denied, these appellees respectfully submit that, under the provisions of Section 9 of Part 1 of the Interstate Commerce Act (49 U. S. C. 9), the District Court of three judges was without jurisdiction to entertain this suit. See *Standard Oil Co.* v. *United States,* 283 U. S. 235, 240-241; *Rochester Tel. Corp. v. United States,* 307 U. S. 125, 140, note 23; *Atlantic Lumber Corporation* v. *Southern Pacific Co.,* 47 F. Supp. 511, 513 (D. Ore.); *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847, 850-851 (N. D. W. Va.), affirmed *per curiam* 283 U. S. 804; *Allison & Co.* v. *United States,* 12 F. Supp. 862, 863-864 (S. D. N. Y.), affirmed *per curiam,* 296 U. S. 546. As this point is fully covered in the motion to affirm filed herein by the appellees, United States and Interstate Commerce Commission, the railroad appellees deem further argument of the proposition unnecessary.

**(b) Merits**

The functions of determining whether a rate, was, is or will be unreasonable and to what extent, are administrative functions expressly reserved for the Commission. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U. S. 426; *Illinois Cent. &c. R. R.* v. *Inter. Com. Comm.,* 206 U. S. 441; *Inter. Com. Comm.* v. *Illinois Cent. R. R.,* 215 U. S. 452, 470; *Int. Com. Comm.* v. *Union Pacific R R.,* 222 U. S. 541, 550; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 512-513, 523. A court may not substitute its judgment

for that of the Commission as to the reasonableness of a rate. *I. C. C.* v. *Inland Waterways Corp.*, 319 U. S. 671, 691; *Scripps-Howard Radio* v. *Comm'n.*, 316 U. S. 4, 10; *Rochester Tel. Corp.* v. *U. S., supra,* 139; *United States* v. *New River Co.*, 265 U. S. 533, 542.

Indeed, in any proceeding wherein a court is called upon to review an order of an administrative body such as the Interstate Commerce Commission, the range of possible issues is closely circumscribed. "Only questions affecting constitutional power statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Tel. Corp.* v. *U. S., supra,* 140. "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." *Virginian Ry.* v. *United States,* 272 U. S. 658, 663. To like effect are *Interstate Commerce Commission* v. *Jersey City, supra,* 512; *I. C. C.* v. *Inland Waterways Corp., supra,* 619; *Georgia Comm.* v. *United States,* 283 U. S. 765, 775; *Western Chem. Co.* v. *United States,* 271 U. S. 268-271; *New England Divisions Case,* 261 U. S. 184, 204.

Where, as here, the evidence submitted to the Commission is not before the reviewing court, the range of possible issues is further limited. This was clearly stated by Mr. Justice Cardoza in *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286, as follows:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Nashville C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, 324; *Edward Hines Trustees* v.

> *United States*, 263 U. S. 143, 148; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 295. • • • The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. • • • The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

See also, *Interstate Commerce Commission* v. *Jersey City*, *supra*, at p. 512; *Lubetich* v. *United States*, 315 U. S. 57, 58; *United States* v. *Lowden*, 308 U. S. 225, 231; *Rochester Tel. Corp.* v. *U. S.*, *supra*, 146.

Under these established principles governing the scope of judicial review of administrative determinations, the District Court was required to determine merely whether the Commission's report disclosed a rational basis of essential findings supporting the assailed conclusion of past reasonableness.

In its report (256 I. C. C. 429), the Commission first reviewed the history of the litigation, the contentions of the parties and the evidence before it, and thereafter, in a separate section entitled "Discussion and Findings" (pp. 451-2), set out certain basic findings drawn from the evidence. Following two paragraphs containing the basic findings from which it determined the question of reasonable rates for the future, the Commission set forth at greater length, in a subsection headed "Reparation," its basic findings relating to the question of past reasonableness and its conclusion here assailed in part. Among the latter basic findings were the following: (a) "The rate of $2.65 is the outgrowth of a rate of $1.50 established in 1906, which in 1915, when we decided *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652, applied from the Pocahontas and New River districts (the base origin groups) to a destination group extending from Lynchburg

on the west to Hampton Roads on the east"; (b) "In that proceeding we found that group to be too large and prescribed a rate of $1.40 to Lynchburg, but denied reparation"; (c) "Since then in more than a dozen proceedings we have prescribed rates from one or more of these origin groups to a number of destinations to the north, south, and west of the present $2.65 group which, in general, compare favorably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period"; (d) "Moreover, in *L. D. Wingfield-Hatcher Coal Co.* v. *Chesapeake and O. Ry. Co.*, 191 I. C. C. 644, decided in 1933, division 5 found not unreasonable this same rate of $2.65 from the New River mines on the C. & O. [the base origin group on that railroad] to Richmond, the principal destination in the group."

In the absence of the evidence from which the Commission drew these basic findings, the District Court, relying upon the doctrine of *Miss. Valley Barge Co.* v. *U. S., supra,* accepted them as true. It concluded that these findings met the test of "basic" or "essential" findings. See *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 465; *Penn. Anthracite Mining Co.* v. *Delaware & H. R. Corp.*, 16 F. Supp. 732, 735, aff'd., 91 F. (2d) 634, cert. den., 302 U. S. 756; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 427-28; *Visceglia* v. *United States*, 24 F. Supp. 355, 357. Moreover, it recognized that these basic findings afforded rational support for the Commission's conclusion that the assailed rates had not been unreasonable in the past. As the court pointed out, "The process of rate making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities." See also *Board of Trade* v. *U. S.*, 314 U. S. 534, 546, and *I. C. C.* v. *U. P. R. Co., supra,* 550, cited in the District Court's opinion.

The mere circumstance that the Commission did not find the $2.65 rate unreasonable in the past to the points in the new Richmond group to which it found that rate unreasonable for the future affords no indication of arbitrary action. The very acts of prescribing reasonable rates for the future and of determining reasonable rates in the past as the basis for awarding reparation are separate functions, one *quasi*-legislative and the other *quasi*-judicial, involving the determination of matters essentially different. *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 486; *Gt. No. Ry* v. *Merchants Elev. Co.*, 259 U. S. 285, 291; *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 388; *Morgan Co.* v. *Great Northern Ry.* (C. C. A. 7th, 1923), 285 Fed. 876, 877; *George Allison & Co.* v. *Interstate Commerce Com'n.*, 107 F. (2d), 180, 186, cert. den., 309 U. S. 656. The District Court recognized the clear line of demarcation between these separate functions. Moreover, the case last cited effectively disposes of the plaintiff's contention that the Commission acted arbitrarily. In that case the Commission found the rates there assailed unreasonable in the past to the extent that they exceeded 120 per cent. of first-class, and that they would be unreasonable for the future to the extent that they exceeded 105 per cent. of first-class. In determining whether these allegedly "opposing conclusions" respecting past and future reasonableness were so arbitrary as to require correction, Groner, C. J., with whom Miller and Rutledge, JJ., concurred, said in part, 107 F. (2d) at p. 186:

> "We find nothing arbitrary or capricious in the Commission's report. In this regard, counsel for shippers say the finding that prior to March 3, 1933, the assailed rates were unreasonable to the extent that they exceeded 120 percent, and that thereafter they were unreasonable to the extent that they exceeded 105 per cent, is a mere arbitrary conclusion unsupported by evidence

and, therefore, mere surplusage. In this view, they say the conclusion should be disregarded and the finding on the basis of 105 per cent should be considered as applicable to both periods. * * *.

After distinguishing the case cited by counsel for the shippers and reviewing the findings made in the Commission's first and second reports, the court went on to say:

> "The November 7th report of the Commission may be subject to the criticism that no particular facts are stressed to explain the reason for the difference in rates in the past and in the future. But the findings, so far as they applied to the past, were made, not for the purpose of fixing rates, but solely to measure reparation. *There was nothing arbitrary in this, since the Commission is not required to award reparation on the same basis used for future rates. We have seen that the Commission often fixes a new rate without granting any reparation.* In this case it has granted reparation, but not to the full extent of the new rates. Many factors may have entered into this finding. * * *" (Emphasis supplied.)

The above case cannot be distinguished from the instant case on the ground that the Commission's order there assailed awarded some but not all of the reparation sought while the Commission's order here assailed denied all reparation. In the prior related case of *George Allison & Co.* v. *United States*, 12 Fed. Supp. 862, affirmed 296 U. S. 546, Circuit Judge Swan, rendering the unanimous opinion of the three-judge Federal District Court for the Southern District of New York, denying the petition of the same shippers and receivers of strawberries for an order setting aside and annulling that part of the Commission's order wherein reparation had been awarded to a level of rates higher than those prescribed for the future, pointed out (p. 864):

> "* * * There can be no substantial difference between review of an order of the Commission denying a shipper reparation, and review of an order granting some damages but denying the full reparation sought. * * *"

While the separate administrative conclusions of past reasonableness and future unreasonableness were supported by basic findings drawn from the same record, termed by appellants as the "same mass of evidence," it by no means follows that each conclusion was made on the *same* evidence. On the contrary, the section of the report wherein the Commission's basic findings were set out, the section headed "Discussion and Findings," shows clearly that the two conclusions were not drawn from the same evidence.

In determining the two distinct questions before it, the Commission weighed the evidence, drew therefrom the findings of fact which it deemed pertinent to the consideration of each question, and then deduced its ultimate administrative conclusions. There was nothing illogical or arbitrary in the process. See *Cape Fear Rys.* v. *United States*, 7 F. Supp. 429, 431, aff'd, 294 U. S. 693. The rational bases for the conclusions were not destroyed by the mere fact that the Commission did not attach to each bit of evidence equal weight in the determination of the two separate questions.

In language of Mr. Justice Jackson, in *Interstate Commerce Commission* v. *Jersey City*, supra, 513:

> "* * * The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad."

Of significance also is the fact that when the appellants were before the Commission they suggested different mathematical measures of past and future reasonableness. They

indicated that the $2.65 destination group might be divided for the future and asked the Commission, in such event, to find as maximum reasonable rates for future application to points in the western division, rates at least 19 cents per ton lower than the rates which they asked the Commission to find as maximum reasonable for past application to the same points.[8]

The District Court readily disposed of appellants' contention that the Commission had substituted a supposed "rule of damage" for its elementary duty of passing upon the "reasonableness per se" of freight rates. The contention was based upon a reference in a prior decision, from which the Commission quoted, to a power "to refuse to hold the rates unreasonable in the past" (Report p. 452). When the phrase is read in the light of the context of the entire report, as it must be (See *Mississippi Barge Co.* v. *United States, supra,* page 289), it is seen simply as an expression of the Commission's obligation under the statute to refuse to grant complainants' prayer for a finding of past unreasonableness when the essential basic findings would not pro-

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[8] The positions of the complaining parties is explained in the following statement found on page 431 of the report of the entire Commission, printed as 256 I. C. C. 429:

"Originally, complainants desired a continuation of both the origin and destination groupings. At the further hearing, however, certain of the complainants expressed a willingness to accept a break-up of the destination grouping. It is contended by complainants that at no time should the rate to the $2.65 destination group have exceeded $2.19. They seek, as to the past, rates of $2.19 from the base groups, $2.44 from the origin differential groups, addition of the existing differential from the Kentucky group, and awards of reparation accordingly. Breaking up of the destination group is not advocated by complainants, but if it should be broken they suggest that from the base groups the rate to Norfolk and intermediate points back to the Richmond-Jarratt line should be $2.35 because to prescribe less would be to break down the integrity of the outside-the-capes rates. To the Richmond-Petersburg-Jarratt group they urge that the rate should not exceed $2 and be observed as maximum at intermediate points, with the Lynchburg rate not in excess of $1.75."

vide rational support for such ultimate finding. As Mr. Justice Douglas stated in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602:

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries a heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

After quoting this statement, which was further approved in *Interstate Commerce Commision* v. *Jersey City, supra,* 512-13, the District Court properly concluded that the appellants' had not "carried the heavy burden, thus imposed on them, by making a convincing showing that the order of the Commission denying reparations is invalid." This appeal raises no questions not fully disposed of by the District Court.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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